

THE SIGNIFICANCE OF THE INTEGRITY SYSTEM

KEYNOTE ADDRESS BY

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On 26 January 1808, precisely 20 years after the arrival of the First Fleet in Sydney Harbour, the British regiment known as the New South Wales Corps deposed Governor William Bligh from office in an event which, some fifty years later came to be called, quite inaccurately, the Rum Rebellion. Australia Day next year marks the 200th Anniversary of this dramatic event in our history. Much of our history is written from the perspective of the long-term implications of our convict heritage. There are, however, also long term implications of our establishment heritage. They include matters of direct relevance to the theme of this Conference.

The New South Wales Corps was a British regiment formed for the express purpose of replacing the Marines who had come with the First Fleet. The group of officers of the Corps constituted a substantial proportion of the ruling class of the original settlement. Although that proportion diminished over time, as an increasing number of emancipated convicts emerged in a leadership role, the officers of the regiment were of considerable significance as the suppliers of the organisational skills and entrepreneurial drive that any society needs. The way in which they obtained the capital necessary to make this contribution was not, at least by contemporary standards, a good look.

The British taxpayer provided considerable funds, particularly in kind, for the creation of an open prison in this region. Money and supplies were provided to create the settlement and establish its ability to feed and provision itself. At the disposal of the authorities was a supply of free labour by the assignment of convicts and land, originally disposed by lease but soon by grant. The political culture of 18th Century England accepted that social standing and personal influence was a proper basis for access to such governmental largesse. The officers of the New South Wales Corps were unlikely to resist replicating the corruption of home.

When the first Governor Arthur Phillip left in 1792, the commanding officer of the Corps assumed complete administrative control of the Colony for three years before Phillip was replaced. During this period the collegiality of the officers' mess transmogrified into a cabal that came to dominate the trading activity of the frontier settlement. As a group the officers could control the allocation of supplies from the government store, determine land grants and assign convicts. There was nothing to restrain such decisions being made in their own interests. Indeed, the operations of the rudimentary court system was suspended. Significantly, the fact that their salaries were paid in London meant that they could draw bills on the British Treasury, a form of payment which anyone who wished to trade in the colony would readily accept. This was the basis of their control over trade, including control over liquor which was in such demand that it became a form of currency in the barter system of the rudimentary economy.

The exceptional mark up arising from the restricted supply of liquor was a manifestation of the cartel controlled by the officers which eventually would lead critics to bestow on the regiment the derisory appellation: the Rum Corps. However, by the time of the so-called Rum Rebellion, the officers of the Corps were primarily interested in land. Trading was mainly conducted by non-commissioned officers.

Even after they lost direct control of the government, the power of the Corps was such that they could make the lives of the succeeding Governors, Hunter and King, exceptionally difficult. Governor William Bligh sought to curtail their economic activity, indeed to expropriate their property. He not only failed to recognise the positive contribution made by the officers of the Corps, he challenged their social status as well as their prosperity. What we would now call corrupt practices had become endemic. The reaction of those whose interests were threatened shows just how difficult it is to extirpate entrenched corruption.

Two hundred years ago next Australia Day, the Corps carried out what can only be described as a military coup which removed Bligh, who already had one mutiny on his record, and took over control of the State apparatus in their own interests. That control could only be removed in one way: the arrival of Governor Lachlan Macquarie in command of his own regiment and the formal dissolution of the New South Wales Corps. Save for mild punishment of the commanding officer at the time of the coup, no-one else suffered in any respect. None of the profits or assets were disgorged. This was not a salutary precedent for the ability to control the private exploitation of public power and assets.

Things have improved over the last 200 years. However, the increase in the size and complexity of our society does mean that maintenance of integrity in government requires a more detailed institutional response than just sending out another Regiment. A wide range of institutions has been established for this purpose.

It is appropriate to characterise this range as a national integrity system as has been in the National Integrity Systems Assessment project conducted by the Key Centre for Ethics Law Justice and Governance of Griffith University and Transparency International Australia. This is a high quality comprehensive Report with which I am sure all members of this audience are familiar. One aspect of the Report with which I have some difficulty is the variety of visual metaphors which seem to have become common currency in this sphere of discourse: from a Greek temple to a bird's nest, together with a narrative explanation of what is going on expressed in terms of pillars or twigs.

Words, rather than images, are my basic tool of trade. I do not feel the need for visual props. Indeed, I regard even the Power Point tool as a form of structured oversimplification, calculated to dumb down discourse. The "birds nest" visual metaphor reminds me of what Aristophanes said in his play *The Birds* that: "Words can give everybody wings". I think I'll stick with words.

The visual metaphor of a bird's nest was, as I understand it, intended to convey the idea that the integrity system consists of a number of different elements which interconnect so that although each may be weak, the system as a whole can be strong. The synergy of interrelated elements is inherent in the idea of a "system". I accept that it is important to consider the interconnections in order to assess the efficacy of the system as a whole, not only the individual components.

As is mentioned in the Final Report of the National Integrity Systems Assessment, I suggested a few years ago that the scope, range and significance of integrity institutions was such that they deserved collective acknowledgement as a fourth branch of government to stand with the legislative, executive and judicial branches. [1] This was characterised in the Report as treating the network of integrity institutions in a "semi-constitutionalised fashion". [2] There is truth in this characterisation.

The concept of the integrity branch of government was intended to emphasise the significance of the role played by the range of institutions that perform integrity functions. Once the constitutional significance of the integrity function is acknowledged, that concept itself can play a role to strengthen the institutional framework, but also to keep it within proper bounds.

In my original address I was particularly concerned to identify the underlying principles of administrative law which, unless constrained by a concept such as an integrity function, could readily slip into merits review that, absent statutory authorisation, is not appropriate as an exercise of judicial power. The same kind of constraint exists for other integrity institutions although, in many cases, the relevant bodies do have statutory merits functions.

The institutions which support the integrity of our system of government include organisations with a principal responsibility for integrity matters such as auditors general, electoral commissions, corruption and integrity commissions and ad hoc inquiries, often in the form of royal commissions. Other institutions perform this function as a substantial proportion of their activities including ombudsmen, parliamentary committees, directors of public prosecutions and, particularly in the context of constitutional and administrative law, the judiciary. The significance of this role is recognised by ensuring that these institutions have institutional autonomy.

There are, of course, many different ways to conceptualise issues of corruption and integrity. My own focus, given the perspective of the law which I adopted, was institutional integrity rather than personal integrity. In practice, of course, these matters are closely related.

My perspective was, and is, understandably, the legal basis of authority. It is necessary for a society that claims to be governed by the rule of law to accept that all governmental authority and power must find an ultimate source in the law, sometimes in a constitution, sometimes in a statute, sometimes in the common law.

However, the concept of institutional integrity goes beyond the question of legality understood in any narrow sense. Institutional integrity also requires a governmental instrumentality to be faithful to the public purposes for the pursuit of which a power was conferred or a duty imposed. Furthermore, its conduct must be in accordance with the values, including procedural values, which the institution is reasonably expected to obey by those who are affected by its conduct and decisions. In any stable polity there is a widely accepted concept of how governance should operate in practice. The role of integrity institutions is to ensure that that concept is realised.

The aspect of the integrity branch of government with which I am most familiar is, of course, administrative law.

Judicial review is the enforcement of the rule of law over the conduct of the executive. The judiciary is empowered, generally by legislation even in nations of the common law tradition, to prevent the executive arm of government from exceeding the powers given to it by law.

Every government institution requires legal authority for any action that it wishes to undertake. In contemporary circumstances such authority is usually found in legislation. However the holder of an executive position is often entitled to act by reason of his or her office and would generally be entitled to do whatever a private citizen is entitled to do. Such entitlement, however, must also be understood as authorised by law.

Action by any government agency that is not supported by legal authority is invalid. What invalidity may mean for the consequences of the invalidated conduct is a matter which each system of administrative law must address.

Judicial review has developed in all advanced legal systems beyond a narrow concept of legality. In the legal tradition with which I am most familiar, the expansion of judicial review has been one of the great projects of the law over the last half century or so. It is now clear that judicial review extends to ensuring that powers are exercised for the purpose, broadly understood, for which they were conferred and in the manner in which they were intended to be exercised.

This is quite distinct from merits review for which separate statutory provision is often made. Merits review is concerned to ensure that the correct and preferable decision is made in a particular case and that the fairness, consistency and quality of decision-making is maintained. Judicial review is a manifestation of the integrity branch of government, whereas merits review is a manifestation of the executive branch.

The practice of judicial review, whether expressly authorised by constitutions, codes or statutes, or a development of judge made law, inevitably gives rise to tension between the judiciary and those whose conduct is being reviewed. It is an important objective of all mechanisms of governance that this inevitable tension should be a creative tension. How this is to be achieved depends upon the extent to which a formal separation of powers is entrenched in the constitutional arrangements of a nation.

Contemporary debates about judicial activism are only the latest in a long history of conflict over judicial review. In the common law tradition there was an intense period of conflict between the Court of Kings Bench and the Stuart Kings over the Court's assertion of a supervisory jurisdiction.

The solution to such conflict in France, after the Revolution, was a strict separation between the judiciary in the *ordre judiciaire*, which exercises the civil and criminal jurisdiction, and the *ordre administratif*.

Over the course of over two centuries, the administrative law developed by the Conseil d'Etat and its subordinate court structure, appears indistinguishable from the operation of judicial review in the common law tradition. Indeed, because of the absence of a detailed code, the law administered by the Conseil d'Etat developed in ways similar to the judge made law of the common law tradition.

In French law the principle of *légalité* encompasses general principles of law - *les principes généraux du droit* - which include a range of propositions^[3] that are very similar to the development in the common law tradition of principles of administrative law and of principles of the law of statutory interpretation, now often referred to collectively as the principle of legality.^[4]

In both civil and common law traditions judicial review goes beyond issues of legality narrowly understood to encompass a duty to give a fair hearing, to act impartially, to give reasons and, to varying degrees, to recognise a range of human rights. It also extends to ensuring that powers are exercised for the purpose for which they were given and in the manner in which they were intended to be exercised, either expressly or on the basis of a procedure which is in conformity with public expectations of how government actors ought behave in the particular nation.

An independent judiciary confident in its own autonomy does not need to be hesitant in asserting its right to enforce the rule of law. Nevertheless, as controversies in many nations attest, those who find their conduct constrained by judicial intervention frequently assert that the judiciary has gone too far. Sometimes these criticisms are valid. More often, however, they merely reflect the frustration of powerful people who are used to getting their own way and cannot do so because of proper legal constraints.

In many jurisdictions the grounds upon which judicial review is permitted may be expressed in such amorphous terms as to invite the judiciary to intervene too frequently. The purposes of administrative law can be stated at different levels of generality. When stated in such terms as preventing "abuse of power" or advancing "good administration", it becomes very difficult to distinguish between review on the basis of legality and review on the basis of merits.

Such vague general standards are sometimes enshrined in a code or statute authorising judicial

review. Even in nations of the common law tradition there is a noticeable tendency over recent decades to expand the scope of judicial intervention by imposing a general label such as “abuse of power” or “proportionality” or “legitimate expectations” beyond longstanding but more limited principles. This is not merely the traditional common law method of induction. It blurs the distinction between legality and merits.

The Australian judiciary has, generally, been more tough minded – some would say narrow minded – in holding the line, than the judiciaries of most other nations with which we compare ourselves. For example, we have refused to adopt the idea of “proportionality” which has entered English law from Europe. We have also rejected any idea of “deference” to administrative decision-makers of the kind adopted in the United States and to some degree Canada and, until recently, in the United Kingdom. Deference is only necessary if the standard to be applied is too wide.

The concept of an integrity function of government, with judicial review as part of an integrity branch of government, expresses appropriate limits upon the permissible scope of judicial review. If intervention by a court is understood as ensuring the institutional integrity of the decision-making process, the judiciary is more likely to act with appropriate restraint. When purporting to ensure that the executive does not exceed its lawful powers, it is of supreme importance that the judiciary must not exceed its own. The issue is judicial legitimacy.

Institutional integrity is, of course, reinforced by personal integrity, directed at the performance and conduct of individuals through whom either singly or collectively any organisation must act. Personal integrity invokes a range of additional requirements involving standards of conduct, particularly ethical standards. There is a debate about whether organisations can be moral agents and whether institutional integrity can also encompass such standards.

Corrupt conduct, in the narrow sense, is almost always personal rather than institutional: the concern with personal integrity is not simply negative – in the sense of preventing corruption. It is also positive – to promote high standards of ethical behaviour. Over recent decades most spheres of discourse, not least in public life, have adopted codes of ethics or of conduct which identify appropriate standards of behaviour.

Of particular concern has been the avoidance of conflicts of interests. Standards and procedures have been developed and, in some cases, formal mechanisms for advice on conflict issues have been established.

Integrity systems directed to both personal and institutional conduct have been described as a means of “institutionalising distrust”. This reflects the fact that such systems are based on the assumption that things go wrong.

Ironically, the purpose of institutionalising distrust is to create the conditions in which there is a high level of trust in mechanisms of governance. The *Analects of Confucius* record the Master saying that there were three matters that are essential for government: weapons, food and the trust of the people. [5] Of the three, Confucius said, trust was the most important.

The level of trust in our society is a form of social capital which has increasingly come to be recognised to be as important as physical capital for the effective and efficient operation of our society and our economy. Social capital includes the institutions which establish the bases for all forms of social interaction. It encompasses the values and rules for social conduct, including the acceptance of civic duties and responsibilities.[6] By enhancing the level of trust in our society integrity systems are a form of social capital which enable transactions with government to occur in an effective and efficient manner.

The sense of personal security of citizens, indeed the existence of social order, is determined in large measure by the extent to which people can arrange their personal affairs and their relationships with associates, friends, family and neighbours on the assumption that basic standards of propriety are met and reasonable expectations are satisfied. In all spheres of conduct, including relations with government, it is essential that individuals and corporations know that they can pursue their lives with a reasonable degree of security, both of their person and of their property.

All forms of social interaction including, relevantly, interaction with public decision-makers, are impeded by the degree to which personal and property rights are subject to unpredictable and arbitrary incursion, so that people live in fear, or act on the basis of suspicion, rather than on the basis that others will act in a predictable way. A high level of predictability establishes the requisite social order and the confidence that one can act in accordance with reasonable beliefs as to one's rights and obligations and that reasonable expectations will be met.

Social capital, like all other forms of capital, is subject to a process of depreciation and requires continuing investment to replenish the capital base. Social capital, like all other forms of capital, is also subject to the possibility of obsolescence, by reason of social and technological changes. Again, this requires constant replenishment of the capital stock. Finally, social growth and increased complexity of society, including in mechanisms of governance, requires additional capital to be deployed, as is the case with other forms of capital in a growing society.

Expenditure on integrity systems can be regarded as a form of investment in social capital, particularly directed to ensuring that a high level of trust exists with respect to the mechanisms of governance.

That does not mean that there are no limits on how much society can afford to invest in such matters. There are limits to the proportion of the gross national product than can reasonably be expended. Investigating agencies are no less prone than other organisations from becoming preoccupied with the significance of what they are doing to the point of self-absorption. Government does not exist for the purpose of being investigated.

In a world of scarce resources, choices have to be made. Nevertheless, to approach expenditure on the integrity system as a form of investment in social capital may provide a useful perspective.

Institutionalising distrust is not a complete statement of the integrity function. That system is not simply negative – in the sense of preventing corruption. It is also positive:

- to ensure that public institutions serve the purposes for which they were established and observe the values to which they are subject – in the case of institutional integrity.
- to ensure the achievement of high standards of probity, honesty and ethical conduct – in the case of personal integrity.

Many years ago Isaiah Berlin published an influential essay on two concepts of liberty in which he distinguished negative liberty – in the sense of freedom from restraint, and positive liberty – in the sense of capacity to have control over the ability to act. It may be useful to analyse many issues in terms of two concepts of integrity - negative and positive. As Berlin found with liberty, the two forms may not be entirely complementary. They may conflict. Priorities may need to be determined.

These are issues with which I have been grappling for some time. My first book was entitled *Secrecy: Political Censorship in Australia*, published in 1972. The style was more polemical than I adopt today. Together with a lecture which summarised the thrust of the book at the Australian

Institute of Political Science Summer School that year, this was early advocacy of Freedom of Information legislation.

In order to see just how far we have come, I found it instructive to look back at the opening chapter of my book. It covered the case of Detective Sergeant Phillip Arantz who, in November 1971, leaked to the *Sydney Morning Herald* a secret report on the incidence of crime in New South Wales.

Arantz was a key member of the research branch of the Police Department responsible for the collection of crime statistics. He noticed that the Police Commissioner's Annual Report to Parliament provided false and misleading statistics on crimes committed and solution rates. All his attempts to correct the information internally were rebuffed. He first leaked information to parliamentarians, but their questions in Parliament were ignored or evaded and the true statistics remained secret.

Frustrated, Arantz gave the full report to the *Herald*. He was disciplined for a breach of public service rules and dismissed from the force. Even more disturbingly, his conduct was regarded, in the then police culture, as so bizarre that the Police Commissioner ordered that he undergo a psychiatric examination. It was later disclosed that the Commissioner had personally rung the psychiatrist at Prince Henry Hospital who noted on his report: "Possible political expediency in bringing pressure to bear on patient's admission".

Over a decade later he was exonerated, notionally reinstated in the force and given an ex gratia payment. Later, after the change in the culture of the force brought about in large measure as a result of Jim Wood's Royal Commission, he was posthumously awarded the Police Commissioner's Commendation for Outstanding Service.

The most direct result of Arantz's public spirited sacrifice – which was considerable – was the establishment of the Bureau of Crime Statistics and Research. This Bureau is a regular source of independent objective information on crime and criminal justice policy in this State. Public debate on the administration of criminal justice is enriched to a degree that other spheres of discourse should envy.

The treatment that Phillip Arantz received is inconceivable today. The institutional structure has been transformed – Freedom of Information legislation, Whistleblower legislation, the Ombudsman, ICAC and with respect to the police, the Wood Royal Commission and the Police Integrity Commission. If and when necessary, each of these mechanisms feed into the ultimate accountability institution, namely, the Parliament of New South Wales.

Furthermore, in all these respects the attitude and involvement of the judiciary, has been transformed both by statute and by development of the common law. The invigoration of administrative law is the most significant judicial development of the law in my legal lifetime. We now have a vigorous set of principles and practices, much of which has been conferred or extended by legislation.

This process is not complete. The High Court's jurisprudence under s75(v) of the Constitution is still developing. Although not directly applicable to State administrative law, the principles applicable to what we now call the constitutional writs will exercise a gravitational pull on the common law.

I do not intend to sound complacent. Like the poor, corruption will always be with us. We have however developed integrity systems over the course of two or three decades which were barely conceivable when I first entered public life. The size of this Conference is itself a manifestation of the strength of the Integrity system of this nation and I wish you well in your deliberations.

END NOTES

1. See J J Spigelman, "The Integrity Branch of Government", (2004) 78 *ALJ* 724. Also accessible at the Supreme Court website <http://www.lawlink.nsw.gov.au/sc> under speeches.

2. *Chaos or Coherence?: Strengths Opportunities and Challenges for Australia's Integrity Systems*, Final Report, December 2005, p15.

3. See N Brown & J S Bell *French Administrative Law* (5th ed) Clarendon Press Oxford 1998 pp214ff.

4. See J J Spigelman "The Principle of Legality and the Clear Statement Principle" (2005) 79 *ALJ* 769 and accessible on the Supreme Court website above.

5. See the *Analects of Confucius* translation by Simon Leys, W W Norton & Co, New York, 1997 par 12.7.

6. See for example, *Social Capital: Reviewing the Concept and its Policy Implications*, Productivity Commission, Canberra, 2003.